UNITED STATES SUPREME COURT

LARRY CRAWFORD, Director, Missouri Department of Corrections, JAMES D. PURKETT, Superintendent, Eastern Reception Diagnostic & Correction Center and JOHN DOES, 1-666 Anonymous Executioners,	)	
Petitioners,	)	
vs.	)	No. _____
MICHAEL ANTHONY TAYLOR,	)	
Respondent.	)	

APPLICATION TO VACATE STAY OF EXECUTION

Petitioners apply to vacate the stay of execution imposed the evening of February 1, 2006, by the United States Court of Appeals for the Eighth Circuit in *Michael Taylor v. Larry Crawford, et al.*, No. 06-1278 (8th Cir. Feb. 1, 2006) (en banc). After that court received a decision from the United States District Court for the Western District of Missouri, the panel voted 2-1 to deny a stay. The en banc court of appeals voted to grant a stay. But it provided no reasoning for its decision.

Procedural History

The court is familiar with the procedural history of this case.

Now, upon en banc review, the court of appeals issued the following order:

> Appellant Michael Anthony Taylor's petition for rehearing en banc is granted. Appellant's application for a stay of execution is granted.
>
> Judge Riley would deny the petition and deny the application for a stay.

Judge Benton took no part in the vote in this matter.

Petitioners now approach this court with a request that the court vacate the February 1, 2006 stay of execution in *Michael Taylor v. Larry Crawford, et al.*, No. 06-1379.

Standard of Review

This court set forth the standard of review in this situation in *Bowersox v. Williams*, 517 U.S. 345 (1996).

> A stay of execution pending disposition of the second or successive federal habeas petition should be granted only when there are substantial grounds upon which relief might be granted. . . . . Entry of a stay on a second or third habeas petition is a drastic measure, and we have held that it is particularly egregious to enter a stay absent substantial grounds for relief.

Id. at 346 (citations and quotation marks omitted). In light of this standard of review, this court should vacate the lower court's stay of execution. This standard, developed in a capital habeas appeal context, similarly applies with stays issued in a civil rights litigation. *Gomez v. United States District Court*, 503 U.S. 653, 653-54 (1992).

The Court of Appeals' February 1, 2006 order is a summary order granting a stay of execution. It gives no explanation whatsoever. Such stays without explanation are rightly disfavored. *Bowersox v. Williams*, 517 U.S. at 346, citing *Netherland v. Tuggle*, 515 U.S. 951 (1995) (per curiam). Reading the stay order in conjunction with the district court's January 31, 2006 judgment (Application Exhibit Q) shows no basis for a stay. Respondent fails to show substantial grounds justifying issuance of a stay.

In Missouri, execution warrants are issued by the Missouri Supreme Court for a particular date. *See, e.g.,* Missouri Supreme Court order of January 3, 2006, and Warrant of Execution (Application Exhibits O and P). *See Delo v. Stokes*, 495U.S. 320,110 S. Ct. 1880, 1881 (1990). They thus permit the execution to take place any time between 12:01a.m. and 11:59 p.m. The warrant expires shortly at 11:59 p.m. on February 1, 2006.

Why The Stay Should Be Vacated

The court of appeals en banc order is unprecedented. It declines to identify a substantial ground for the stay. In fact, it declines to provide any reason for the stay. During Timothy Johnston litigation and now the Michael Taylor litigation, Missouri has now proved to the satisfaction of two district judges that there is no basis for §1983 relief as to Missouri's method-of-execution. In contrast, Taylor can show no circuit or state court that has granted relief. This case is not a "substantial ground" for a stay.

Respondent Taylor makes three claims in this case, which he filed as a § 1983 action. He first challenges Missouri's method of lethal injection as violative of the Eighth Amendment's ban of cruel and unusual punishments. He next claims that his due process rights under the Fourteenth Amendment will be violated because a physician will assist in preparations for the execution and such assistance by a physician is a violation of medical ethics. Then, he asserts that lethal injection, as performed in Missouri, violates the Thirteenth Amendment in that it constitutes a badge of slavery.

Respondent Taylor cannot succeed on the merits on any of these claims.

Missouri's method and means of administration of lethal injection are not cruel and unusual. The Eighth Amendment prohibits punishments that involve "'unnecessary and wanton inflictions of pain.'" *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S. Ct. 285, 290 (1976) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S. Ct. 2909, 2925 (1976)). It also prohibits those that are inconsistent with "evolving standards of decency that mark the progress of a maturing society." *Estelle*, 429 U.S. at 102, 97 S. Ct. at 290 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01, 78 S. Ct. 590, 598 (1958). Any punishment must be consistent with human dignity and comply with current civilized standards. *Trop*, 356 U.S. at 96-102, 78 S. Ct. at 597-98.

Missouri is among 37 of the 38 states with the death penalty that use lethal injection as a method of execution. *See Cooper v. Rimmer*, 379 F.3d 1029, 1032 (9th Cir. 2004). "There is general agreement that lethal injection is at present the most humane type of execution available and many states have abandoned other forms of execution in favor of lethal injection." *Hill v. Lockhart*, 791 F. Supp. 1388, 1394 (E.D. Ark. 1992). *See also LaGrand v. Lewis*, 883 F. Supp. 469, 471 (D. Ariz. 1995) (citing cases that have affirmed the constitutionality of lethal injection), *aff'd*, 133 F.3d 1253 (9th Cir. 1998), *cert. denied*, 525 U.S. 971, 119 S. Ct. 422 (1998). Moreover, medical experts have urged that death by lethal injection is more humane than previously used means of execution. *See People v. Stewart*, 520 N.E.2d 348, 358 (Ill. 1998), *cert. denied*, 488 U.S. 900, 109 S. Ct. 246 (1988).

In addition to this case law generally finding lethal injection to be a humane method of execution, Missouri's particular method of lethal injection and means of administering the drugs have recently been found to pass constitutional muster, in the district court decision here (Application Exhibit Q), at pages 4-7, and in *Johnston v. Crawford*, No. 4:04-CV-1075 CAS, slip op. at pp. 9-10 (E.D. Mo. August 26, 2005) (Application Exhibit A; "*Johnston* slip op."). In *Johnston*, the plaintiff raised the same two Eighth Amendment issues Taylor raises here:

(1) There is a significant risk that the sodium pentothal (also called thiopental sodium) administered first in the execution process, either through administration by untrained personnel or due to the amount administered, will not render the condemned prisoner unconscious until his death, with the result that he will be conscious and suffer pain from the administration of pancuronium bromide (also called pavulon), which is the second drug administered and which causes paralysis and suffocation, and of potassium chloride, which is the third drug administered and which causes pain as it goes through the veins before it reaches the heart and stops it. (It was also asserted in *Johnston*, as here, that the paralysis caused by the pancuronium bromide would render the inmate incapable of demonstrating that he was conscious and experiencing pain.) *Johnston* slip op. at p. 1; *Taylor,* slip op. at 4-6.

(2) The administration of the three drugs used in the execution process into the femoral vein by means of a triple lumen catheter causes undue pain. *Johnston* slip op. at p. 7; *Taylor,* slip op. at 6-7.

With regard to the first claim, Dr. Dershwitz, the defense expert, testified in the *Johnston* case that the 5 gram dose of sodium pentothal given in Missouri[1] would render most people unconscious within a few seconds and that by the time all 5 grams are injected over 99.9999999% of the population would be unconscious. *Johnston* slip op. at p. 5; Testimony of Dr. Dershwitz (Application Exhibit D), at p. 18; Affidavit of Dr. Dershwitz (Application Exhibit E; also presented to the district court at the trial in this case as Defendants' Exhibits 1-5), at ¶ 8.[2] (Dr. Dershwitz also testified to the same effect yesterday in the hearing in this case.) The *Johnston* court found that this testimony was essentially unrebutted by Dr. Heath, the plaintiff's expert, in that he testified only that the dose of sodium pentothal would be insufficient *only if it was administered incorrectly*. *Johnston* slip op. at pp. 5-6. The court also noted that Dr. Heath had conceded in *Beardslee v. Woodford*, 395 F.3d 1064, 1075 (9th Cir. 2005), that a 5 gram dose of sodium pentothal, if administered

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[1]No changes in the means used in the execution of Johnston are anticipated for the execution of respondent Taylor. Application Exhibit F (Answer to Supplemental Interrogatory No. 18 (p. 2).

[2]Dr. Dershwitz also explained that "[b]ecause these probability calculations by definition could never be 0 percent on one end or 100 percent on the other, we end up with probabilities with a lot of nines in them because mathematically you cannot have in this type of calculation 100 percent. But this is practically speaking a dose that guarantees unconsciousness in everybody for a significant period of time." Exhibit D, at p. 18.

properly, "would likely be sufficient to cause unconsciousness and probably death prior to the administration of pancuronium bromide." *Johnston* slip op. at p. 5 (quoting *Beardslee*). With regard to the possibility that an error in administration of the drugs could result in a risk of suffering, the court, citing *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463-65, 67 S. Ct. 375, 376-77 (1947), ruled that such a "possibility of human error or accident is insufficient to establish a constitutional violation." *Johnston* slip op. at p. 4; *see also Johnston* slip op. at p. 7; *Taylor* slip op. at p. 5. It should also be noted that a 5 gram dose of sodium pentothal is 12.5 times the normal surgical dosage and would render most people unconscious for more than 13 hours. *See Beardslee*, 395 F. 3d at 1075. The district court here properly concurred in those findings and conclusions. *Taylor* slip op. at 5.

Additionally, the court in *Johnston* found the doctor and nurse involved in Missouri executions to be qualified. *Johnston* slip op. at p. 7. The court specifically noted the evidence that the doctor had prepared sodium pentothal (the only one of the three drugs that requires mixing on site) 1000 times and had placed IV central lines 20,000 to 30,000 times. *Johnston* slip op. at p. 7 n.1. This same doctor is expected to be involved in respondent Taylor's execution. Defendant Crawford's Answers to Plaintiffs' Supplemental Interrogatories (Application Exhibit F), responses to Interrogatory No. 18 (p. 2), No. 22a (p. 8), and 22c (p. 10).

The *Johnston* court also rejected the claim that administering the drugs through the femoral vein with a triple lumen catheter was improper "because the mere possibility rather

than any probability of the infliction of . . . pain, and because the possibility is dependent upon mistakes in the procedure involving accidental punctures and other complications not reasonably foreseeable and not constitutionally relevant." *Johnston* slip op. at p. 8.[3] The court then specifically pointed out that the doctor performing the procedure in Missouri is a board-certified surgeon and qualified to perform the procedure. *Johnston* slip op. at p. 8. *See also* Application Exhibit F, response to Supplemental Interrogatory No. 18 (p. 2) and No. 22a (p. 8) (doctor expected to perform the procedure at Taylor's execution, who is also doctor that performed the procedure in the last five executions, is a board-certified surgeon). Similarly, the *Taylor* district court rejected this claim. *Taylor* slip op. at 6.

The court in *Johnston* granted summary judgment against the prisoner on the challenge to Missouri's means of lethal injection, stating:

> plaintiff's proof, even if accepted as true and accurate, is insufficient to establish the Eighth Amendment will be violated by Missouri's lethal injection protocol. Both qualitatively and quantitatively, the opinions of plaintiff's expert are inadequate to rationally support a conclusion that his execution as planned carries an unconstitutional risk of the unnecessary and wanton infliction of pain sufficient to violate standards of decency in the context of the purposeful and lawful extinguishment of life.

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[3]Petitioners Crawford and Purkett also note that one of respondent Taylor's own experts here, Dr. Heath, provided an affidavit in *Nelson v. Campbell*, 541 U.S. 637, 645-647, 124 S. Ct. 2117, 2124 (2004), that appears to have supported the use of a percutaneous central line as a proper means administration of the drugs in an execution. A percutaneous central line is one inserted by "passage through the skin by needle puncture, including introduction of wires and catheters." Stedman's Medical Dictionary 1325 (26th ed. 1995) (definition of percutaneous). This is the type of central line challenged by respondent Taylor as described in the Amended Complaint (Doc. No. 36) in ¶ 73.

Johnston slip op. at pp. 9-10. *See also* Application Exhibit D, at p. 25 (Dr. Dershwitz testified that "I think that if the protocol as described here is implemented, the likelihood that the inmate will experience any suffering is negligible"); Application Exhibit E[4], at ¶ 5 (Dr. Dershwitz's opinion that "a condemned inmate who is administered five grams of thiopental sodium will be rendered unconscious, and not experience pain, for the time period necessary to complete the execution"); Application Exhibit E, at ¶¶ 9-14 (Dr. Dershwitz's opinions regarding the vanishingly small probabilities that a condemned inmate given a 5 gram dose of thiopental sodium could be conscious, and able to experience any pain associated with the subsequent administration of pancuronium bromide and potassium chloride); *Taylor* slip op. at 5.

The Eighth Amendment claims of respondent Taylor here (even assuming he has a valid individualized method-of-execution § 1983 claim under *Nelson*, 541 U.S. at 644, 124 S. Ct. at 2123) are no different from those already ruled in the *Johnston* case. Taylor has offered no facts here different than the facts that existed in *Johnston*, which the court concluded were insufficient to state a claim as a matter of law.[5] In this absence of any

[4]Exhibit E was admitted as Defendants' Exhibits 1-5 before the district court.

[5]*Johnston*'s general approval of Missouri's lethal injection procedure also precludes any argument by respondent Taylor that the chance of error in his execution could render that procedure constitutionally infirm in his particular case. The Supreme Court has rejected constitutional challenges based on an "'unforeseeable accident,' and has presumed that state officials [will act] 'in a careful and humane manner.'" *Beardslee*, 395 F.3d at 1075 (quoting *Louisiana Ex rel. Francis v. Resweber*, 329 U.S. 459, 461-463, 67 S. Ct. 374, 375 & 376 (1947)). "The risk of accident cannot and need not be eliminated from the execution process in order to survive constitutional review." *Campbell v. Wood*, 18 F.3d 662, 687 (9th Cir.

legitimate contention by Taylor contradicting the petitioner prison officials' demonstration that Missouri's means of execution does not gratuitously inflict pain, the stay of execution here should be vacated. Taylor has no chance of success on the merits of the claim he raises here.

Further, with regard to the Eighth Amendment claims here, petitioners Crawford and Purkett note that the drugs used in Missouri's lethal injection process, have also been approved, either in the context of rulings on the merits or on requests for injunctive relief or stays, by many other courts. *Beardslee*, 395 F.3d at 1076 (denial of stay and injunctive relief); *Cooper*, 379 F.3d at 1033 (denial of stay and injunctive relief); *In re Williams*, 359 F.3d 811, 813-14 (6th Cir. 2004) (denial of stay and injunctive relief); *Abdur'Rahman v. Bredesen*, 2004 WL 2246227, at *15-*18 (Tenn. Ct. App., October 6, 2004) (decision on merits), *aff'd*, 2005 WL 2615801, at *9-*13 (Tenn. Oct 17, 2005) (affirmed on the merits); *Reid v. Johnson*, 333 F. Supp. 2d 543, 552-54 (E.D. Va. 2004) (denial of injunctive relief); *Johnson v. State*, 827 N.E.2d 547, 552-53 (Ind. 2005) (denial of post-conviction relief); *Sims v. State*, 754 So. 2d 657, 666-70 (Fla. 2000) (denial of habeas relief); *State v. Webb*, 750 A.2d 448, 457 (Conn. 2000) (decision on the merits). None of these courts found a substantial ground to justify a stay-of-execution.

1994); *State v. Webb*, 750 A.2d 448, 455 (Conn. 2000). *See also Cooper*, 379 F.3d at 1033; *Reid v. Johnson*, 333 F. Supp. 2d 543, 551 (E.D. Va. 2004).

Respondent Taylor's past contentions that there was no full hearing on the merits in the *Johnston* case disregards the evidentiary hearing held in that case on August 26, 2005. *See* Application Exhibit D. Johnston had the opportunity to produce evidence in support of the contention that Missouri's method of execution would result in the infliction of gratuitous pain and did so fully through documentary evidence. *Id.* at 5. *See also* Application Exhibit A (references throughout to opinions of Johnston's expert). Johnston's lawyer also had a full and fair opportunity at the hearing to cross-examine the state's expert. Application Exhibit D, pp. 34-54. And now Taylor has had his own hearing, and the district court found his claims meritless (Application Exhibit Q).

As in *Johnston*, Respondent Taylor produced nothing to contradict the evidence that the 5 gram dose of sodium pentothal given in Missouri would render most people unconscious within a few seconds and that by the time all 5 grams are injected over 99.9999999% of the population would be unconscious. Application Exhibit A, at p. 5; Testimony of Dr. Dershwitz (Application Exhibit D), at p. 18; Affidavit of Dr. Dershwitz (Application Exhibit E), at ¶ 8. Nor did he suggest that given more time, he might find such evidence.

Respondent Taylor's past suggestion that the sufficiency of the level of sodium pentothal administered is "belied" by the use of pancuronium bromide to "mask symptoms" of an inadequate level of anesthesia is incorrect. First, in making this point Taylor does not even attempt to refute the evidence of Dr. Dershwitz that 99.9999999% of the population

would be unconscious after the administration of the sodium pentothal. Second, petitioners Crawford and Purkett explained the reasons for use of pancuronium bromide in their discovery responses. This drug mitigates the seizure activity and other involuntary bodily movements that will commonly result from use of sodium pentothal and potassium chloride alone and thus will result in a more peaceful, dignified, solemn, and humane death of the condemned prisoner. Application Exhibit F, at pp. 13-14.

Respondent Taylor has also suggested that there is some contradiction between the prison officials' own statistics that "death does not occur until after the administration of the third chemical" and "the contrary contention of their expert." Taylor appears to be perceiving a contradiction between Dr. Dershwitz's testimony that the administration of 5 grams of sodium pentothal will cause most persons to stop breathing within a minute of drug administration (Application Exhibit E, at ¶ 8) and a table provided in discovery showing that 2 to 5 minutes pass between the time of the injection of the first drug and the time of death (Defendant Crawford's Supplemental Answer to Plaintiffs' Interrogatory No. 6n; Application Exhibit J[6]). As can be seen by the explanation of "Time of Death" in Application Exhibit J, there is no discrepancy here because death is pronounced based on electrical activity of the heart, not based on when breathing stops.

[6]The initial response to Interrogatory 6n did not include the explanation of "Time of Death" included at the end of the supplemental response. The supplemental response was provided shortly after respondent Taylor raised his contention that the table contradicted Dr. Dershwitz's testimony.

Physician's role in executions does not violate due process. Respondent Taylor asserts that his right to due process will be violated if a physician has a role in the execution process because such a role by a physician violates medical ethics and thereby his "legitimate expectation that a physician will not use his or her special skills and position of trust to kill rather than treat." Amended Complaint, ¶ 84 (Doc. No. 36). The district court found the claim meritless as a matter of law. *Taylor* slip op. at 7. There is no substantial ground for issuance of a stay.

Respondent Taylor cites the Code of Ethics of the American Medical Association to support his claim that physician involvement in the execution process is a breach of medical ethics. Amended Complaint, ¶ 81. But, it is not the AMA Code of Ethics that governs the conduct of physicians in Missouri. *See* Chapter 334, RSMo (§ 334.100 sets out ethical standards). The petitioner prison officials have searched for, but been unable to find, any interpretation of medical ethics imposed upon physicians in Missouri that would prohibit the physician from having a role in the execution process. A California court, however, has examined this issue with regard to California law and determined that physician involvement in executions does not constitute unprofessional conduct. *Thorburn v. Department of Corrections*, 78 Cal. Rptr. 2d 584, 590-91 (Cal. Ct. App. 1998).

Respondent Taylor here fails to establish a premise of his argument – physician involvement in executions is a violation of ethics in Missouri. In fact, such involvement is quite consistent with medical ethics. Physician involvement shows the medical profession's

compassion for all, including those sentenced to death. By their involvement, physicians are promoting the basic medical tenet of easing pain and suffering by doing what they can to make executions as humane as possible.

Even if physician involvement in Missouri executions were prohibited as unethical conduct, respondent Taylor still has not stated a claim. The claim that death-sentenced inmates have a "legitimate expectation that a physician will not use his or her special skills and position of trust to kill rather than treat" is incongruous in the context in which it is raised here. Logically, an inmate sentenced to death would have no legitimate expectation that anyone involved in the execution would direct any of his or her skills toward diminishing the likelihood of death.

Further, as the court in *Abdur'Rahman v. Bredesen*, 2004 WL 2246227, at *8 n.45 (Tenn. Ct. App., Oct. 6, 2004), *aff'd*, 2005 WL 2615801 (Tenn. Oct. 17, 2005), stated:

> Were [medical licensing] requirements applicable to executions by lethal injection, the Department's ability to carry out its statutory mandates would be undermined because many licensed medical professionals would decline to participate in the procedure. It was for this reason that the Tennessee Supreme Court noted that "no public policy is violated by allowing physicians or anyone else to participate in carrying out a lawful sentence." *Coe v. Sundquist*, No. M2000-00897-SC-R9-CV (Tenn. Order Apr. 19, 2000).

2004 WL 2246227, at *9. Where public policy is not violated by a physician having a role in the execution process (even where such a role might be inconsistent with the ethical pronouncements of a professional regulating body), it cannot be said, as respondent Taylor contends, that there is any legitimate expectation that a physician will not have a role in

executions. Without such a legitimate expectation, Taylor has no due process right that is constitutionally protected. *See Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1, 7, 99 S. Ct. 2100, 2103-04 (1979).

Further, at least in the prison disciplinary context, state created liberty interests giving rise to due process rights are generally limited to those that impose "atypical and significant hardship." *Sandin v. Conner*, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300 (1995). Respondent Taylor's claim here that he has some sort of protected right that a physician not have a role in the execution process fails under the *Sandin* standard because the presence of a physician at his executions will not cause him any hardship at all, much less one that is atypical and significant. The presence of a physician may, on the contrary, be a benefit to Taylor.

As the district court concluded, *Taylor* slip op. at p. 7 and 9, Taylor fails to show either that Missouri physicians who are involved in the lethal injection process are violating their ethical obligations or that physician's involvement violates a condemned prisoner's due process rights. He has no likelihood of success on the merits of this claim. The court of appeals did not identify this issue as a substantial ground to justify a stay-of-execution.

Missouri's method of lethal execution does not violate the Thirteenth Amendment. Respondent Taylor contends that Missouri's method of lethal injection constitutes a vestige and badge of slavery and therefore violates the Thirteenth Amendment. Amended Complaint, ¶ 124. The district court found this claim too meritless as a matter of law, *Taylor* slip op. at 7-8. This is not a substantial ground for issuance of a stay.

The Thirteenth Amendment provides:

> Neither slavery nor involuntary servitude, *except as a punishment for crime*, whereof the party shall have been duly convicted shall exist within the United States or any place subject to their jurisdiction.

(Emphasis added.) The Thirteenth Amendment does not apply here because this case involves neither slavery nor involuntary servitude. Even if it did, the Amendment specifically makes exception for instances in which a person is being punished for a crime. Respondent Taylor here falls within this exception. *See Wendt v. Lynaugh*, 841 F.2d 619, 620 (5th Cir. 1988) (plaintiff who has been convicted of a crime in no position to claim a right under the Thirteenth Amendment because exempted by precise words from its application); *Jobson v. Henne*, 355 F.2d 129, 131 (2d Cir. 1966) ("Thirteenth Amendment has no bearing on the legality of the imprisonment of persons duly convicted of a crime; such persons are explicitly excepted from the Amendment's coverage"); *Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir. 1963) ("Thirteenth Amendment has no application where a person is held to answer of a violation of a penal statute").

Moreover, a difference in treatment based on race is required to establish a claim under the Thirteenth Amendment of imposition of a "badge of slavery." *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 445, 88 S. Ct. 2186, 2206 (1968). Missouri's method of execution is used on condemned prisoners of all races. Therefore, it cannot be considered as a "badge of slavery." This ground is not a substantial ground for issuance of a stay-of-execution.

Effect of Recent Capital Litigation

The recent grant of certiorari in *Hill v. Crosby*, No. 05-8794 (U.S. S. Ct., Jan. 25, 2006), does not support Taylor's argument here that his execution is properly barred. Although the *Hill* case does arise from claims regarding the constitutionality of Florida's method of lethal injection, the questions on which certiorari was granted are procedural only and have no bearing on the question here of whether respondent Taylor has established a sufficient basis on which to support an order to prohibit his execution. The questions presented in the petition for certiorari in *Hill* were:

> 1. Whether a complaint brought under 42 U.S.C. § 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the chemicals utilized for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. Sec. 2254?
>
> 2. Whether, under this Court's decision in *Nelson*, a challenge to a particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 U.S.C. § 1983?

Hill v. Crosby Petition for Certiorari, p. i. These questions merely address the proper procedural vehicle by which to challenge a specific method of execution. The lower courts in *Hill* addressed only the question of jurisdiction, found it wanting, and never considered the means of execution. *Hill v. Crosby*, No. 4:06-CV-032-SPM (N.D. Fla., Jan. 21, 2006) (claim denied for lack of jurisdiction) (Application Exhibit H); *Hill v. Crosby*, No.06-10621 (11th Cir., Jan. 24, 2006) (denying stay of execution due to district court's lack of jurisdiction to hear case in first instance) (Application Exhibit I). This Court's interest in *Hill* does not

appear to arise from any question as to the method of execution,[7] but rather from an intent to better define the circumstances in which method of execution claims may be pursued as claims under § 1983, an issue expressly left open in *Nelson v. Campbell*, 541 U.S. 637, 644, 124 S. Ct. 2117, 2123 (2004).

Here, petitioners and the lower courts have proceeded as if the *Hill* issue had been decided in Taylor's favor. And with good reason: The procedural question in *Hill* was ruled against Crawford and Purkett in the *Johnston* litigation. *Johnston v. Crawford*, 2005 WL 1474022, at *2 (W.D. Mo. 2005). Thereafter the prison officials demonstrated at a hearing that the method was humane. Application Exhibits A and D. Petitioners do not concede that the procedural ruling in Johnston was correct. But rather than delay proceeding by arguing against it, they have presented – and now in the expedited proceedings ordered by the Eighth Circuit, recreated – the *Johnston* record. The conclusion in *Johnston* that Missouri's execution process is lawful, reconfirmed here by the district court, is not called into question by the grant of review on the procedural question in *Hill*.

Even if Taylor is correct that this case properly remains a § 1983 action, the order barring his execution was still an abuse of the court's discretion. It is an abuse of discretion

[7]Even if the Court's interest were the method of execution, it should be noted that the method of execution in Florida provides for the administration of no less than 2 grams of sodium pentothal, *Hill v. State*, 2006 WL 91302, at footnote 3, while Missouri's method of execution provides for the administration of 5 grams of that drug. Exhibit D, at p. 12; Exhibit E, at ¶ 4B.

because the underlying claims here are meritless. Whichever form of action is proper, the stay of Taylor's execution should be vacated and that execution allowed to proceed.

This view of *Hill* seems confirmed by this Court's recent denial of certiorari in *Bieghler v. Indiana*, No. 05-8824 (Jan. 26, 2006). Mr. Bieghler raised a claim against the same three-drug sequence used in executions as does respondent Taylor in this case. Indiana, like Missouri petitioners here, did not rest on a challenge Mr. Bieghler's use of the § 1983 as a remedial vehicle (Application Exhibit K). The district court declined to enjoin Mr. Bieghler's execution (Application Exhibit K). The Seventh Circuit, voting 2-1, ordered a delay in the execution (Application Exhibit L), but this Court overturned that order (Application Exhibit M) and the execution proceeded.

Given where it has led, respondent Taylor's claim here should have been pursued in a habeas action. But that is not an issue petitioners raise in seeking for vacation of the stay order, because even if this case is properly pursued under § 1983, the order prohibiting Taylor's execution still constitutes an abuse of discretion. Again, as shown in the *Johnston* proceedings, discussed above, and by the district court order yesterday in this case, Missouri provides a humane method of execution that does not inflict any gratuitous pain on the condemned. The showing made by petitioners here goes beyond that shown in the *Bieghler* proceedings.

This Court's vacation of the stay entered in *Bieghler* seems to demonstrate that its grant of certiorari in *Hill* case was based on a view that there was a need to resolve the

question left open in *Nelson v. Campbell*, 541 U.S. 637, 644, 124 S. Ct. 2117, 2123 (2004), of when a method-of-execution claim should be brought in a habeas or civil rights suit. While that issue has been raised here, petitioners have also gone past that issue and established that Missouri's execution process does not constitute cruel and unusual punishment. Resolution of the questions in *Hill* will not have any ultimate impact on Taylor's claims here.

Interests of the Parties and the Public

To the extent that the Court considers an assessment of the interests of the parties and the public appropriate here, the balance of those interests favors vacation of the stay of execution. The potential harm to respondent Taylor to be assessed is not whether his death will be the result of his execution, for he asserts that he is not challenging the fact of his death sentence. He is challenging the means of his execution. Thus, the harm to Taylor for the Court to consider here is the harm to him from execution by means of Missouri's three-drug process. In other words, will Taylor's execution as planned cause him significant pain that is unnecessary? *See Reid*, 333 F. Supp. 2d at 551. As shown above by the decision in *Johnston v. Crawford,* and by the district court's order, and by the testimony of Dr. Dershwitz, respondent Taylor's execution by Missouri's three-drug process is humane and will not result in any significant discomfort.

The harm to others and the public interest that results from an order barring Taylor's execution on February 1, 2006, is the harm to the family of the victim and the harm to

Missouri's public policy that would result in an interference with the imposition of the just punishment of Taylor. The state of Missouri has determined that the death penalty is appropriate in certain circumstances. Those circumstances were found to exist in this case[8] and respondent Taylor was sentenced to death. *State v. Taylor*, 929 S.W.2d 209 (Mo. banc 1996), *cert. denied*, 519 U.S. 1152, 117 S. Ct. 1088 (1997). He has now pursued his post-conviction remedies and his conviction and sentence of death have been approved. States have "a significant interest in meting out a sentence of death in a timely fashion." *Nelson*,541 U.S. at 644, 124 S. Ct. at 2123. *See also Gomez*, 503 U.S. at 654, 112 S. Ct. at 1653; *In re Blodgett*, 502 U.S. 236, 239, 112 S. Ct. 674, 676 (1992). Stopping Taylor's execution now, based on unfounded assertions of inhumanity in Missouri's execution process, would interfere with the victim's family's ability to obtain closure and with the state's policy that crimes such as Taylor's call for the ultimate punishment.

Conclusion

For the foregoing reasons, petitioners pray that this court vacate the court of appeals' latest order granting a stay of execution in *Taylor v. Crawford*, No. 06-1379WMJC (8th Cir. Feb. 1, 2006). Vacating the stay will vindicate once again the conclusion of a competent

[8]Respondent Taylor and an accomplice kidnapped a 15-year old girl while she was waiting for a school bus, bound and blindfolded the girl, threatened her with death, raped her, put her in the trunk of their car, and then stabbed her repeatedly with kitchen knives. The girl probably lived for 30 minutes after she was stabbed. *State v. Taylor*, 929 S.W.2d 209, 214 (Mo. banc 1996), *cert. denied*, 117 S. Ct. 1088 (1997).

finder of fact that the execution method chosen by Missouri and 37 other states does not violate constitutional strictures.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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